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## It's Complicated: The Unusual Way *Obergefell v. Hodges* Legalized Same Sex Marriage

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# IT'S COMPLICATED: THE UNUSUAL WAY *OBERGEFELL V. HODGES* LEGALIZED SAME SEX MARRIAGE

*Kristin Haule\**

## I. INTRODUCTION

The recent Supreme Court decision, *Obergefell v. Hodges*,<sup>1</sup> struck down all state laws that prohibit same-sex marriage.<sup>2</sup> LGBT activists and same-sex marriage proponents rejoiced,<sup>3</sup> while opponents of same-sex marriage lamented.<sup>4</sup>

Unfortunately, the decision fell short of providing protection from discrimination on the basis of sexual orientation in non-marital contexts, such as housing and employment.<sup>5</sup> Instead, it declared the right to marry “fundamental,” under the Due Process Clause,<sup>6</sup> potentially causing problems for other state laws which regulate

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\* J.D., Loyola Law School, Los Angeles, May 2016. Many thanks to the members of the *Loyola of Los Angeles Law Review* for their careful and diligent efforts in bringing this Comment through the publication process.

1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2607.

3. See Garret Epps, *The U.S. Supreme Court Fulfills Its Promises on Same-Sex Marriage*, THE ATLANTIC (June 26, 2015), <http://www.theatlantic.com/politics/archive/2015/06/same-sex-marriage-supreme-court-obergefell/396995/>; Adam Liptak, *Supreme Court Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>; Dawn Ennis, *Victory at Supreme Court for Marriage*, ADVOCATE (June 25, 2015, 9:55 AM), <http://www.advocate.com/politics/marriage-equality/2015/06/25/victory-supreme-court-marriage-equality>.

4. See *Supreme Court Decision on Marriage “A Tragic Error” Says President of Catholic Bishops’ Conference*, U.S. CONF. CATH. BISHOPS (June 26, 2015), <http://www.usccb.org/news/2015/15-103.cfm>.

5. See James Esseks, *After Obergefell, What the LGBT Movement Still Needs to Achieve*, ACLU BLOG (July 7, 2015, 10:15 AM), <https://www.aclu.org/blog/speak-freely/after-obergefell-what-lgbt-movement-still-needs-achieve>; Brandon Lorenz, *Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law*, HRC BLOG (July 7, 2015), <http://www.hrc.org/blog/entry/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina>; Jon Green, *We Won on Marriage. Hiring and Housing Discrimination Are Next*, AMERICABLOG.COM (June 29, 2015, 10:00 AM), <http://americablog.com/2015/06/we-won-on-marriage-hiring-housing-discrimination-next.html>; Alexa Ura, *Gay Rights Activists: Fight Is Only Getting Started*, TEX. TRIB. (June 29, 2015), <http://www.texastribune.org/2015/06/29/gay-activists-next-fight-discrimination-protection/>.

6. *Obergefell*, 135 S. Ct. at 2599.

marriage, and held that some nebulous combination of the Due Process and Equal Protection Clauses combine to invalidate laws “in some instances.”<sup>7</sup>

Section II of this Comment explores the legal framework of Due Process jurisprudence, Equal Protection jurisprudence, and the cases upon which the *Obergefell* Court relies that employ a sort of hybrid Due Process/Equal Protection analysis. It also discusses the historical framework of evolving Court decisions in the contexts of marriage, procreation, and child rearing.

Section III of this Comment breaks down the *Obergefell* decision, explaining the Court’s reasoning and justifications. Section IV explains the potential ramifications of the reasoning in the *Obergefell* decision, and Section V proposes three alternative bases that would have limited the potential for these ramifications. Finally, Section VI concludes that any of the three proposed alternative bases would have minimized ambiguity in the law while simultaneously protecting the rights of same sex couples in other, non-marital contexts as well.

## II. LEGAL & HISTORICAL FRAMEWORK

The two clauses of the Fourteenth Amendment at issue in this case are the Due Process Clause and the Equal Protection Clause.<sup>8</sup> The Fourteenth Amendment of the Constitution provides, in relevant part, “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>9</sup>

### A. Due Process Clause

The Due Process Clause (depriving any person of life, liberty, or property, without due process of law) protects rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>10</sup> It protects those rights that are “fundamental to our Nation’s particular scheme of ordered liberty and system of justice.”<sup>11</sup> These are rights, the deprivation of which “offend[s] those

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7. *Id.* at 2603.

8. *Id.* at 2602–03.

9. U.S. CONST. amend. XIV, § 1.

10. *See Snyder v. Massachusetts*, 291 U.S. 97, 104–05 (1934) (overruled in part on other grounds by *Malloy v. Hogan*, 378 U.S. 1 (1964)).

11. *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)).

canons of decency and fairness which express the notions of justice.”<sup>12</sup> The list of “fundamental rights” is currently relatively small. It includes many of the rights of the first eight Amendments of the Constitution,<sup>13</sup> which encompasses the right to obtain and use contraception,<sup>14</sup> among a few other rights.<sup>15</sup>

If a right is “fundamental” pursuant to the Due Process Clause, the government may not pass a law abridging that right, unless it can pass strict scrutiny.<sup>16</sup>

### *B. Equal Protection Clause*

The Equal Protection Clause (denying any person “equal protection of the laws”) protects “discrete and insular minorities” from discrimination on the basis of their protected classification.<sup>17</sup> Not all classifications are protected, however, and the level of protection depends on the type of classification.<sup>18</sup> For example, laws, which classify individuals on the basis of race, must pass strict scrutiny.<sup>19</sup> This requires that classifications be “narrowly tailored” to a “compelling government interest.”<sup>20</sup> However, laws, which classify individuals on the basis of gender, are subject to a less exacting, “intermediate” level of scrutiny, which only requires that the law be “substantially related” to an “important” governmental interest.<sup>21</sup> The lower standard of scrutiny is due to the genuine physical differences between the genders; Equal Protection requires only that those “similarly situated” be treated similarly under the law, and

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12. *Malinski v. New York*, 324 U.S. 401, 417 (1945).

13. *McDonald*, 561 U.S. at 763.

14. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

15. *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (mandating that children attend public school violates the parents’ and guardians’ rights to “direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (preventing schools from teaching children foreign languages prior to eighth grade violates the parents’ right to control their children’s education); *see also BMW of N. Am. v. Gore*, 517 U.S. 559, 586–87 (finding excessive punitive damages are an arbitrary punishment in violation of the Due Process Clause) (Breyer, J. concurring).

16. *See Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

17. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

18. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and must pass “rigid scrutiny”); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that racial classifications which purport to be “separate but equal” are inherently unequal and run afoul of the Equal Protection Clause).

19. *Id.*

20. *See United States v. Windsor*, 133 S. Ct. 2675, 2717 (2013) (citations omitted).

21. *Id.* (citations omitted).

sometimes physical differences justify laws, which treat the genders differently.<sup>22</sup> Finally, most other laws are subject only to rational basis review, whereby the law must only be “rationally related to a legitimate state interest.”<sup>23</sup> “States are accorded wide latitude” with respect to the laws they implement, and as such, most laws withstand rational basis scrutiny.<sup>24</sup> However, a “bare congressional desire to harm” is not a legitimate governmental interest, even under rational basis review.<sup>25</sup>

### C. Due Process and Equal Protection Interrelation Cases

In practice, there are a number of cases that do not fit neatly into either Due Process or Equal Protection, so the Supreme Court has used a combination of the two clauses to invalidate certain laws.

This was perhaps first seen in *Skinner v. Oklahoma ex rel. Williamson*.<sup>26</sup> There, the Oklahoma Habitual Criminal Sterilization Act provided a mechanism to sterilize any person convicted of three felonies involving moral turpitude.<sup>27</sup> Although the Court indicated it invalidated the law on Equal Protection grounds, and therefore did not reach the Due Process issue,<sup>28</sup> it nonetheless decreed, “[m]arriage and procreation are fundamental to the very existence and survival of the race.”<sup>29</sup> The Court then explained that under Oklahoma’s law, people who had embezzled funds would not be sterilized, while those who had entered a chicken coop to steal chickens would.<sup>30</sup> The law therefore impermissibly treated similarly-situated criminals differently, in contravention of the Equal Protection Clause.<sup>31</sup> But people who are convicted of felonies of moral turpitude are not a protected class for purposes of the Equal Protection Clause; obviously, a basic tenet of our criminal justice system is that different levels and classifications of crimes bring about different levels of punishments.<sup>32</sup> So an argument based purely on Equal

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22. See *id.* (quoting *Michael M. v. Superior Court, Sonoma Cty.*, 450 U.S. 464, 471 (1981)).

23. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

24. *Id.*

25. See *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

26. 316 U.S. 535 (1942).

27. *Id.* at 536.

28. *Id.* at 538.

29. *Id.* at 541.

30. *Id.* at 539.

31. *Id.* at 540–41.

32. See *Weems v. United States*, 217 U.S. 349, 366–67 (1910) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”).

Protection grounds necessarily fails. To justify its result, the Court explained that because the disparate punishment in this case was sterilization, and procreation is “fundamental” to the survival of the human race, a state may not classify felons who committed virtually the same crime such that one is sterilized and the other is not.<sup>33</sup> In essence, the severity of the “right” in question, combined with the severely disparate treatment was enough to exceed the threshold of constitutionality.

Similarly, in *Reynolds v. Sims*,<sup>34</sup> the Court invalidated a district apportionment, which allowed a mere 37 percent of Alabama’s population to control a majority of Alabama’s representatives.<sup>35</sup> Essentially, denying a citizen equal representation on the basis of geography violates the Equal Protection Clause.<sup>36</sup> Again, to justify the result, the Court relied heavily on the notion that voting is “a fundamental political right.”<sup>37</sup> Because Alabama wanted to limit such an important right for people who are otherwise similarly situated, but live in a different geographical location within Alabama, the combination of the Due Process and Equal Protection arguments again pushed this law over the threshold into unconstitutionality.

Two years later, the Court followed this reasoning again to invalidate a poll tax in *Harper v. Virginia State Board of Elections*.<sup>38</sup> To justify its result, the *Harper* Court relied heavily on *Reynolds* and again emphasized the “fundamental” importance of “the right of suffrage.”<sup>39</sup>

In 1983, the Court acknowledged that sometimes the “due process and equal protection principles converge”<sup>40</sup> and invalidated the revocation of probation on the basis of the defendant’s inability to pay under a combination of both principles.<sup>41</sup> This notion was reiterated in 1996 in *M.L.B. v. S.L.J.*,<sup>42</sup> where the Court held that people whose parental rights are being terminated have a fundamental right to an appeal, and cannot be denied that appeal due

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33. *Skinner*, 316 U.S. at 539–41.

34. 377 U.S. 533 (1964).

35. *Id.* at 568.

36. *Id.*

37. *Id.* at 562 (quoting *Yick Wo v. Hopkins*, 119 U.S. 356 (1886)).

38. 383 U.S. 663, 670 (1966).

39. *Id.* at 667–68.

40. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

41. *Id.* at 665–66, 672.

42. 519 U.S. 102 (1996).

to an inability to pay record preparation fees.<sup>43</sup> In justifying its result by combining the Due Process and Equal Protection Clauses, the Court elaborated, “[a] precise rationale has not been composed, because cases of this order cannot be resolved by resort to easy slogans or pigeonhole analysis.”<sup>44</sup>

The interrelation between the Due Process and Equal Protection Clauses has also arisen in the marriage context. In the landmark 1967 case, *Loving v. Virginia*,<sup>45</sup> the Court invalidated state laws, which banned interracial marriages as an impermissible racial classification under the Equal Protection Clause.<sup>46</sup> But then, after dedicating eleven pages to the Equal Protection issue, the Court also declared in a comparatively small two paragraphs that, “[m]arriage is one of the ‘basic civil rights of man’”<sup>47</sup> and a “fundamental freedom” protected by the Due Process Clause of the Fourteenth Amendment.<sup>48</sup> But it does not seem as though marriage is a fundamental right, since thirty-one states still ban or otherwise restrict marriages between first cousins, for example.<sup>49</sup> If marriage were a fundamental right, presumably any state law which interferes with the right to marry on the basis of family relationship or age or marital status would have to withstand strict scrutiny.

There is also jurisprudence, which involves both Due Process and Equal Protection with regard to the fundamental right to “marital privacy” established in *Griswold v. Connecticut*.<sup>50</sup> The *Griswold* court held that interfering with a married couple’s access to birth control was an impermissible intrusion on the fundamental right to marital privacy, in contravention of the Due Process Clause.<sup>51</sup>

In 1972, the Court extended the *Griswold* access to birth control to unmarried persons in *Eisenstadt v. Baird*.<sup>52</sup> Although it relied heavily on *Griswold*, which hinged on the Due Process Clause,<sup>53</sup> the

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43. *Id.* at 107.

44. *Id.* at 120 (citations omitted).

45. 388 U.S. 1 (1967).

46. *Id.* at 12.

47. *Id.* (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

48. *Id.* at 12.

49. *State Laws Regarding Marriages Between First Cousins*, NCSL, <http://www.ncsl.org/research/human-services/state-laws-regarding-marriages-between-first-cousi.aspx> (last visited Oct. 12, 2015).

50. 381 U.S. 479, 485–86 (1965).

51. *Id.*

52. 405 U.S. 438, 443 (1972).

53. *Griswold*, 381 U.S. at 481.

*Eisenstadt* Court actually held that prohibiting contraception violated the rights of “single persons” pursuant to the Equal Protection Clause.<sup>54</sup> But instead of finding some protected class, the Court instead held that the law was not rationally related to any legitimate state interest.<sup>55</sup>

This notion was taken a step further in *Lawrence v. Texas*,<sup>56</sup> where the Court invalidated laws banning intimate sexual relations between same-sex couples under the Due Process Clause.<sup>57</sup> However, the Court noted that both the Equal Protection and Due Process Clauses were implicated in this case.<sup>58</sup> The Court explained, “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres” and it “demeans the lives of homosexual persons.”<sup>59</sup>

Most recently, in *United States v. Windsor*,<sup>60</sup> the Court invalidated the Defense of Marriage Act (DOMA), which prevented same-sex married couples from receiving federal benefits associated with marriage.<sup>61</sup> Again, the Court held that the statute violated both the Due Process and Equal Protection Clauses, by finding that it was not rationally related to any legitimate governmental interest.<sup>62</sup>

### III. *OBERGEFELL V. HODGES*

*Obergefell* involves consolidated cases from Michigan, Kentucky, Ohio, and Tennessee, where marriage was defined as “a union between one man and one woman.”<sup>63</sup> Fourteen same-sex couples and two men whose same-sex partners are deceased brought suit, claiming the denial of the right to marry their same-sex partners or to legally recognize their same-sex marriages lawfully performed in another state violated the Fourteenth Amendment.<sup>64</sup> Each district

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54. *Eisenstadt*, 405 U.S. at 443.

55. *Id.* at 444–54.

56. 539 U.S. 558 (2003).

57. *Id.* at 578.

58. *Id.* at 575.

59. *Id.*

60. 133 S. Ct. 2675 (2013).

61. *Id.* at 2695.

62. *Id.* at 2693 (holding that a “bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group”).

63. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

64. *Id.*



court ruled in the petitioners' favor.<sup>65</sup> The Sixth Circuit consolidated the cases and reversed, holding that there is no constitutional obligation to license or recognize same-sex marriages.<sup>66</sup>

The Supreme Court granted certiorari as to two questions: (1) whether the Fourteenth Amendment requires a state to issue marriage licenses to two people of the same sex; and (2) whether the Fourteenth Amendment requires a state to recognize same-sex marriages licensed and performed in another state.<sup>67</sup> The Court answered "yes" to both questions.<sup>68</sup>

The Court began its opinion by establishing the historical importance of marriage, describing the changes in the law over time regarding marriage, and listing cases that demonstrate public shifts in perception regarding homosexuality.<sup>69</sup> It wove this notion of emerging attitudes and legal rights into the opinion to set up its holding that same-sex couples have the right to marry.<sup>70</sup>

The Court then declared that marriage is a fundamental right under the Due Process Clause of the Fourteenth Amendment.<sup>71</sup> The Court cited four principles for finding that the right to marry is fundamental: (1) it is a personal choice regarding individual autonomy;<sup>72</sup> (2) "it supports a two-person union unlike any other in its importance to the committed individuals;"<sup>73</sup> (3) it safeguards children and families and draws meaning from the related rights of childrearing, procreation, and education;<sup>74</sup> and (4) it is "a keystone of our social order."<sup>75</sup>

But instead of continuing with the Due Process Clause's strict scrutiny analysis, the Court then discussed the Equal Protection Clause, explaining that the Equal Protection and Due Process Clauses of the Fourteenth Amendment work together and "may be

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 2599 ("[S]ame-sex couples may exercise the right to marry."); *id.* at 2608 ("[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

69. *Id.* at 2597.

70. *See id.* at 2602 (Rights rise "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.").

71. *Id.* at 2599 ("[T]he reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples" as it has previously applied to opposite-sex couples.).

72. *Id.*

73. *Id.*

74. *Id.* at 2600 (internal citations omitted).

75. *Id.* at 2601.

instructive as to the meaning and reach of the other.”<sup>76</sup> It explained that the Court did just this, relying on both the Equal Protection and Due Process Clauses to previously invalidate prohibitions on interracial marriage and marriages involving a father who is behind on child support.<sup>77</sup>

The Court then explained that it was inappropriate to wait and let the legislature deal with the issue, because prohibiting same-sex marriage abridges a fundamental right,<sup>78</sup> same-sex couples are being harmed in the interim,<sup>79</sup> and allowing same-sex couples to get married would not negatively impact opposite-sex marriages.<sup>80</sup>

Finally, it established that each state must recognize same-sex marriages legally performed in another state.<sup>81</sup> In a comparatively short three paragraphs, the Court noted that to rule otherwise “would maintain and promote instability and uncertainty.”<sup>82</sup> The Court then explained that because each state is now required by the Constitution to issue marriage licenses to same-sex couples, there is no “lawful basis” to permit states to refuse to acknowledge a same-sex marriage legally performed in another state on the basis of its same-sex character.<sup>83</sup>

Justices Roberts, Scalia, Thomas, and Alito all published dissents in the case. Justice Roberts first asserted that the question of whether to legalize same-sex marriage is a matter for the legislature, not for judges, to decide.<sup>84</sup> He then noted that marriage has been traditionally and historically defined as being between one man and one woman.<sup>85</sup> He noted that this issue was already raised (and dismissed) in the case *Baker v. Nelson*,<sup>86</sup> which arose shortly after the *Loving* case, and attempted to use the same logic to legalize same-sex marriages.<sup>87</sup> He then reiterated the notion that judges must “‘exercise the utmost care’ in identifying implied fundamental rights,

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76. *Id.* at 2603.

77. *Id.*

78. *See id.* at 2605–06.

79. *See id.* at 2606 (citing *Bowers v. Hardwick*, 478 U.S. 186, 190–95 (1986) and *Lawrence v. Texas*, 539 U.S. 558 (2003)).

80. *See id.* at 2606–07.

81. *Id.* at 2607–08.

82. *Id.*

83. *Id.*

84. *Id.* at 2611 (Roberts, J., dissenting) (“But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.”).

85. *Id.* at 2612.

86. *Id.* at 2615 (citing *Baker v. Nelson*, 409 U.S. 810 (1972)).

87. *Id.*

‘lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.’”<sup>88</sup> He further noted that this decision may open the door to polygamy, because there do not appear to be any legally cognizable reasons that the “two-person” element of marriage would withstand, while the “man-woman element” would not.<sup>89</sup> Finally, he criticizes the majority’s determination that there exists a “synergy between” the Equal Protection and Due Process Clauses, and notes that the majority does not proceed with the standard Equal Protection analysis.<sup>90</sup>

The other three dissenting justices largely agreed. Justice Scalia wrote separately to emphasize the idea that the debate over same-sex marriage was “American democracy at its best,”<sup>91</sup> and something that is better left to the legislature than to be decided by judges.<sup>92</sup> Justice Thomas noted that he disagrees with substantive due process generally, and does not think judges should create additional “fundamental rights” not explicitly listed in the Constitution.<sup>93</sup> But even if substantive due process were permissible, he argued, there has been no requisite deprivation of liberty.<sup>94</sup> Finally, Alito noted that same-sex marriage is not rooted in our history or traditions, but instead is a relatively new right.<sup>95</sup>

#### IV. POTENTIAL RAMIFICATIONS OF *OBERGEFELL*

The most apparent problem with the *Obergefell* decision is that it asserts the idea that marriage is a fundamental right protected by the Due Process Clause.<sup>96</sup> But if marriage is a fundamental right, then every state law regulating marriage must withstand strict scrutiny. Potentially, this could prevent states from prohibiting marriages between siblings, or from setting age limits on marriage, or from denying a person who is already married the right to marry another.<sup>97</sup>

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88. *Id.* at 2616 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

89. *Id.* at 2621.

90. *Id.* at 2623.

91. *Id.* at 2627.

92. *See id.*

93. *Id.* at 2631.

94. *Id.* at 2632.

95. *Id.* at 2640 (Alito, J., dissenting).

96. *Id.* at 2604.

97. *See id.* at 2621–23 (Roberts, J., dissenting).

Second, the reasoning in *Obergefell* unnecessarily adds to our murky Equal Protection/Due Process hybrid jurisprudence without providing any clear limitations on when some hybrid analysis of the Due Process and Equal Protection Clauses is appropriate, as opposed to following the analysis of one, the other, or both. As the Court explained:

Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.<sup>98</sup>

But “some instances” does not instruct on how this doctrine can be limited, or when it is appropriate. This “I’ll know it when I see it” approach to constitutionally protected civil rights may achieve the desired result of legalizing same-sex marriage, but it does so on very shaky legal grounds, and only adds to confusion about when laws violate the Equal Protection and/or Due Process Clauses.<sup>99</sup>

#### V. ALTERNATIVE WAYS THE COURT COULD HAVE RULED

The potential problems created by *Obergefell* could have been avoided in several ways. One of the big criticisms with the decision is that, while gay marriage is now legal, the LGBT community still faces discrimination in areas such as housing and employment.<sup>100</sup> The easiest way the Court could have legalized gay marriage and also addressed the problem of housing and employment discrimination would have been to hold that homosexuals are a protected class, pursuant to the Equal Protection Clause. In fact, Justice Ginsburg suggested in a recent interview that this is how she would have written the opinion, had it been hers to write.<sup>101</sup> By

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98. *Id.* at 2603 (citations omitted).

99. *See id.* at 2623 (Roberts, J., dissenting).

100. *See* Esseks, *supra* note 5; Lorenz, *supra* note 5; Green, *supra* note 5; Ura, *supra* note 5.

101. *See* Mark Joseph Stern, *Ruth Bader Ginsburg Reveals How She Would Have Written the Marriage Equality Decision*, SLATE (July 30, 2015, 10:36 AM), <http://www.slate.com/>

determining that discrimination on the basis of sexual orientation runs afoul of the Equal Protection Clause, then any law, which discriminates on that basis, would be subject to strict scrutiny,<sup>102</sup> and more often than not, invalidated.

Alternatively, the Court could have invalidated the laws, which ban same-sex marriage on Equal Protection grounds using the already-existing gender discrimination class, following the reasoning in *Loving*. Just as a law preventing a person of one race from marrying a person of another race impermissibly classifies on the basis of race, a law preventing a person of one gender from marrying a person of the same gender impermissibly classifies on the basis of gender. However, because laws which classify on the basis of gender are only subjected to the less-exacting “intermediate scrutiny,”<sup>103</sup> it would have been a slightly harder case to uphold same-sex marriage, but not impossible. Certainly, opponents of same-sex marriage would point out the physical differences between same-sex and opposite-sex couples, and the relative effects on procreation.<sup>104</sup> But fertility is not currently a requirement of marriage.

Finally, the Court could have simply held that laws, which prohibit same-sex marriage, are derived from a bare desire to harm homosexuals, and as such, bear no rational basis to a legitimate state interest.

Any one of these three alternative Equal Protection rationales would avoid the problems caused by declaring marriage a fundamental right and would legalize same-sex marriage on much clearer grounds.

## VI. CONCLUSION

Many proponents of same-sex marriage applaud the recent decision in *Obergefell*.<sup>105</sup> Unfortunately, the decision prevents only discrimination in the marriage context, as opposed to setting up the framework to prohibit discrimination in areas such as housing and employment, which are certainly also “central to individual dignity and autonomy.”<sup>106</sup> The decision also employs a confusing “hybrid”

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[blogs/the\\_slate.com/2015/07/30/ruth\\_bader\\_ginsburg\\_on\\_marriage\\_equality\\_how\\_she\\_would\\_have\\_written\\_the.html](http://blogs/the_slate.com/2015/07/30/ruth_bader_ginsburg_on_marriage_equality_how_she_would_have_written_the.html).

102. See *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

103. See *United States v. Windsor*, 133 S. Ct. 2675, 2717 (2013) (citations omitted).

104. See *Obergefell*, 135 S. Ct. at 2613 (Roberts, J., dissenting).

105. See Epps, *supra* note 3; Liptak, *supra* note 3; Ennis, *supra* note 3.

106. See *Obergefell*, 135 S. Ct. at 2597.

analysis,<sup>107</sup> combining both the Due Process and Equal Protection Clauses in a vague way to exceed the threshold of constitutionality, instead of simply relying on either the traditional Due Process or Equal Protection Clauses. Furthermore, by declaring marriage a fundamental right, pursuant to the Due Process Clause, the door has been opened to potentially invalidate other common restrictions on marriage, such as age, marital status, and familial relationship.

A much clearer and stronger decision would have been to decide this case under the Equal Protection Clause. The Court could have invalidated the laws by declaring that classification on the basis of sexual orientation is impermissible, pursuant to Equal Protection. Alternatively, the Court could have decided this case as an impermissible gender classification under the Equal Protection Clause, following the same reasoning as *Loving*. Finally, the Court could have held that the laws banning same-sex marriage were enacted out of a bare desire to harm, and as such, there is no legitimate state interest under rational basis review.

Any one of these three alternatives would have achieved the desired result of legalizing same-sex marriage, but on clearly-established Equal Protection grounds. This would eliminate both the potential impact on other laws, which restrict marriage, and also the potential confusion by allowing laws to be invalidated due to the nebulous combination of Due Process and Equal Protection principles “in some instances.”<sup>108</sup>

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107. *See id.* at 2602–03.

108. *Id.* at 2603.

